

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

JAMAICA HOSPITAL MEDICAL
CENTER,

Employer

and

INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 30

Petitioner

and

1199 SEIU UNITED HEALTHCARE
WORKERS EAST,

Intervenor.

Case No. 29-RC-253629

* * * * *

**REQUEST FOR REVIEW FROM THE DECISION
AND DIRECTION OF ELECTION AND FOR A STAY
PENDING THE RESOLUTION**

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PRELIMINARY STATEMENT

This brief is submitted on behalf of Jamaica Hospital Medical Center (“JHMC” or the “Hospital”) to the National Labor Relations Board (“NLRB” or the “Board”) in support of JHMC’s Request for Review. The February 26, 2020 Decision and Direction of Election (“DDE”) of Regional Director Kathy Drew-King should be overturned because 1) the Regional Director’s decision on a substantial factual issue is clearly erroneous; and 2) the conduct of the hearing and/or rulings made at the hearing resulted in prejudicial error.

Specifically, the Director erred in its finding that 1199 SEIU’s existing bargaining unit was non-conforming because it excluded all skilled maintenance employees, specifically, the petitioned for unit consisting of 14 plant supervisors. As elaborated in detail below, the Hospital and the Intervenor are parties to a collective bargaining agreement covering all skilled maintenance employees in the CBA. The plant supervisors are stationary engineers, because they perform the same basic job functions as stationary engineers, and, thus, the Intervenor’s existing unit encompasses all skilled maintenance employees as required by 29 CFR § 103.30. As such, the existing unit is a conforming unit and the Regional Director’s decision on a substantial factual issue is erroneous and it should be overturned.

Alternatively, even if the plant supervisors are of a different job classification, the Director disregarded compelling evidence which establishes that the plant supervisors share an overwhelming community of interest with the skilled maintenance employees in the Intervenor’s current bargaining unit. For these reasons, the petitioned for unit constitutes an appropriate unit residual to the existing bargaining unit represented by the Intervenor.

I. FACTUAL BACKGROUND

JHMC is an acute care hospital and Level One Trauma Center in Queens, New York. JHMC is one of two hospitals within the Medisys Health Network, Inc. (“Medisys”), a not-for-profit corporation. Medisys supports JHMC and Flushing Hospital Medical Center (“FHMC”), also located in Queens, New York. JHMC and FHMC are members of the League of Voluntary Hospitals and Homes of New York. As in the case of JHMC, 1199 SEIU represents most FHMC employees, in its bargaining unit, including a group of stationary engineers. FHMC and JHMC’s Collective Bargaining Agreement (the “CBA” or “League Agreement”) with 1199 SEIU is effective through September 30, 2021. (*See*, Exhibit A, Declaration of Ayanna T. Blake).

A. THE ENGINEERING DEPARTMENT’S OPERATION

JHMC operates 24 hours per day and 7 days per week. Among other things, the Hospital’s Engineering Department (the “Department”) is responsible for maintaining extensive heating, air conditioning, refrigeration, sprinkler and ventilation systems in all campus buildings as well as its off-site clinics. The Department consists of plant supervisors, HVAC mechanics and technicians who together are responsible for operating the boilers, air conditioning equipment, pumps, condensers, generators and compressors.

Additionally, the Department consists of various trade “shops” that are comprised of electricians, plumbers, painters, carpenters and maintenance workers. There are approximately 48 non-supervisory employees across these trade shops in various titles. These employees report to supervisory personnel within each trade shop. For instance, employees within the electrical trade shop report to an electrical supervisor.

The Department's management team includes a Director, an Assistant Director and a Chief Engineer. All supervisors within each trade shop report to the the Chief Engineer and the Director. As cited in the Regional Director's decision, while employees within each trade shop are separately supervised, the Director and Chief Engineer are the only individuals authorized to make decisions on the terms of employment (i.e., hiring and firing, discipline, promotion, transfer, etc.) of all skilled maintenance employees in the Department, including plant supervisors. (Tr. 68:7-18). Further, it is undisputed that there is common supervision in the Department, as all non-supervisory employees report to the Director, Assistant Director and Chief Engineer. (DDE at 12).

1. The plant supervisor's role

As described in the Regional Director's decision, plant supervisor's work across three different shifts: the morning shift (6:00a.m. to 2:30p.m.); the evening shift (2:30pm to 10:30pm); and the overnight shift (10:30p.m. to 6:00a.m.). (DDE at 3). During these shifts, plant supervisors serve various functions in the Department.

a) The Morning Shift

During the morning shift, plant supervisors along with HVAC technicians and mechanics primarily respond to "work orders" or complaints fielded from Departments in the Hospital. (Tr. 95;14-19). As an example, if there are temperature issues in a patient's room, the plant supervisor resolves the issue or assigns an HVAC staff member to resolve the issue. (Tr. 95: 3-19). Where an HVAC staff member responds to an assignment, the plant supervisor is responsible for assessing the work performed by the HVAC mechanic. (Tr.110-111: 25; 1-6). In either situation, the plant supervisor has substantial contact with HVAC staff, spending most of the time either on the

Hospital floor or in the operating plant (where HVAC equipment is located) to ensure that issues are resolved. Additionally, during the morning shift, plant supervisors perform routine inspections by reading the Hospital's Building Management System ("BMS"), to ensure plant equipment is operating safely. If the plant supervisor discovers an issue during the inspection, an HVAC staff member may resolve the issue.

As demonstrated above, the tasks performed by the plant supervisors and HVAC staff members are functionally integrated to ensure the proper maintenance of the Hospital's mechanical and electrical systems.

b) The Evening and Night Shift

During the evening and night shift, plant supervisors serve in various functions and work in conjunction with the skilled maintenance employees across all trade shops who also work the "after hour" shift. During these shifts, plant supervisors are the only supervisory personnel on duty. Primarily, plant supervisors respond to and resolve complaints. However, they also ensure the work performed by all employees and contractors is performed proficiently. (Tr. 47;1-25). Furthermore, plant supervisors are also required to perform tasks within the trade shops, including minor plumbing, electrical repairs, carpentry and maintenance work on an as-needed basis.

B. COLLECTIVE BARGAINING HISTORY

For over 40 years, 1199 SEIU has exclusively represented the majority of JHMC employees, under a CBA. (See, Exhibit A, Declaration of Ayanna T. Blake). Excluded from the bargaining unit are traditionally exempt positions, including, supervisors, and confidential,

executive and managerial employees as well as the Hospital's security guards who are represented by a different labor organization.

The Hospital's use of the title "plant supervisor" has varied over time, but the position has historically been designated to engineering titles, including, "stationary engineer" and "watch engineer, as the responsibilities, licensing and certification requirements are identical.

As evidence, FHMC's Engineering Department consists of approximately four full and part-time stationary engineers who earn approximately \$42.66 per hour, slightly less than plant supervisors at JHMC. The position description setting forth the job responsibilities for FHMC's stationary engineer is identical to the JHMC's plant supervisor position and they require the same licensing and certifications. (*See*, Exhibit A, Declaration of Ayanna T. Blake). FHMC's stationary engineers have historically been represented by 1199 SEIU, under its existing CBA. (*See*, Exhibit A, Declaration of Ayanna T. Blake). Likewise, the stationary engineer position is explicitly included as a uniform job title and/or classification under The League Agreement.

Accordingly, the current CBA clearly defines the scope of the Intervenor's bargaining unit, making it a conforming unit under the the Board's Health Care Rule. Thus, the appropriate remedy is unit clarification to resolve the misclassification of the plant supervisors who have historically performed the essential functions of stationary engineers because their duties and responsibilities are fundamentally the same.

II. PROCEDURAL POSTURE

On December 20, 2019, the International Union of Operating Engineers, Local 30 ("Local 30") filed a Petition (the "Petition") under Section 9(c) of the National Labor Relations Act

(“NLRA”), seeking to represent a unit of plant supervisors employed by the Hospital. 1199 SEIU intervened on the Petition on grounds that the unit is residual to the existing bargaining unit and CBA presently effective until September 2021. The Hospital sought to dismiss the Petition on grounds that the plant supervisors were statutory supervisors within the meaning of Section 2(11) of the NLRA, or in the alternative, shared a community of interest with the existing bargaining unit represented by 1199.

On January 7, 2020, a hearing commenced before Hearing Officer Annie Hsu (“Hearing Officer Hsu”). Among other things, Hearing Officer Hsu requested that 1) the Intervenor produce the CBA or any document evidencing the scope of its bargaining unit; and 2) the Hospital produce a full and part time plant supervisor. On January 16, 2020, the hearing continued and concluded before Hearing Officer Shao Chen (“Hearing Officer Chen”).

On January 10, 2020, in furtherance of the Board’s request, present at the hearing on behalf of the Hospital was a plant supervisor, Gerald McSloy (“Mr. McSloy”). Due to several side bar communications with Local 30’s counsel, on that date, Hearing Officer Hsu consented to an adjournment in contemplation of a settlement. (*See*, Exhibit A, Declaration Ayanna T. Blake).

During a recess, Counsel for Local 30 presented information to the undersigned respecting Mr. McSloy. (*See*, Exhibit C, Declaration of Ayanna T. Blake). In sum and substance, Counsel for Local 30 suggested that the Hospital produce a different witness because Local 30 representative present during the proceedings had damaging information to cross examine Mr. McSloy on. (*See*, Exhibit A, Declaration of Ayanna T. Blake). Based upon this information provided by Counsel for Local 30, the undersigned held a conversation with Mr. McSloy, to which he became concerned. (*See*, Exhibit A, Declaration of Ayanna T. Blake). Following this conversation, Mr. McSloy

informed the Hospital that he was not willing to testify on behalf of the Hospital. (*See*, Exhibit A, Declaration of Ayanna T. Blake).

On January 16, 2020, the hearing continued, as the parties could not resolve the matter. As a result of the events involving Mr. McSloy on the previous hearing date, no plant supervisor was willing to testify on the Hospital's behalf, despite numerous efforts by the Hospital to compel their testimony. The undersigned made a record of the same. (*See*, Exhibit A, Declaration of Ayanna T. Blake). Rather, on behalf of Local 30, plant supervisor Michael McGroarty ("Mr. McGroarty") testified and was subject to direct and cross examination by the parties.

Additionally, Mr. McGroarty was subject to questioning from Hearing Officer Chen. Despite having a plant supervisor witness present, the Board did not elicit the vigorous "community of interest" evidence that is required by law. At the conclusion of Mr. McGroarty's testimony and after Mr. McGroarty left the hearing room, Hearing Officer Chen adjourned for a recess and made representations that he would speak with his supervisor. (*See*, Exhibit A, Declaration of Ayanna Blake). Upon his return, Hearing Officer Chen requested additional testimony from Mr. McGroarty for "community of interest" evidence. At that time, Mr. McGroarty was no longer available and Local 30 represented that he would not be available to return to the proceeding. (*See*, Exhibit A, Declaration of Ayanna T. Blake).

Thereafter, there were several conversations held with NLRB Board Agent, Kate Anderson who represented that she was the supervisor of Hearing Officer Chen. (*See*, Exhibit A, Declaration of Ayanna T. Blake). At that time, the undersigned explained the events concerning Mr. McSloy on the previous hearing date and that the Hospital had no subpoena authority and could not compel its employees to testify at any proceeding, absent a court ordered subpoena. (*See*, Exhibit A, Declaration of Ayanna T. Blake). After a recess, Hearing Officer Chen reconvened the hearing

and informed the parties that it would not adjourn the proceeding any further and that the hearing would conclude with the testimony on record respecting the community of interest evidence. The parties concluded the hearing with closing statements.

III. THE STANDARD OF GRANTING A REQUEST FOR REVIEW

There are four bases for the Board to grant a Request for Review. Pursuant to Section 102.67 of the Board's Rules and Regulations, the Board will grant a Request for Review upon one or more of the following grounds:

1. That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent;
2. That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party;
3. That the conduct of the hearing or any ruling made in connection with the proceedings has resulted in prejudicial error; or
4. That there are compelling reasons for reconsideration of an important Board of an important Board rule or policy.

In this case, the DDE should be overturned because the conduct of the hearing and/or rulings made in connection with the proceedings caused prejudice to JHMC and the Regional Director's decision on a "substantial factual issue is clearly erroneous," and such error prejudicially affects the rights of JHMC. *See, In re Video Tape Enters., Inc.*, 214 NLRB 1037 (1974) (Board granted employers request for review brought pursuant to "clearly erroneous" standard); *In re Kamehameha Sch. Bernice Bishop Estate*, 213 NLRB 52 (1974) (Board granted brought pursuant to "clearly erroneous" standard). Additionally, the Regional Director's decision

that the Intervenor's bargaining unit is non-conforming should be overturned because it departs from Board law and compelling reasons warrant reconsideration.

The Board reviews *de novo* the Acting Regional Director's decision. *See, Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950) ("[W]e base our findings as to the facts upon a *de novo* review of the entire record, and do not deem ourselves bound by the Trial Examiner's findings."); *See also, Sands Berthworks Gaming, LLC*, 361 NLRB 916 (2014) ("The Board then stated it had considered *de novo* the representation issues and the hearing officer's report recommending disposition of them."). In *Williamson Mem'l Hosp.*, the Board ruled that "where the fact-finder's conclusions are not based on a resolution of all the relevant facts, the Board should make its own factual findings." (*See, Williamson Mem'l Hosp.*, 284 NLRB 37, 37 (1987).

IV. THE REGIONAL DIRECTOR'S DECISION ON SUBSTANTIAL FACTUAL ISSUES IS CLEARLY ERRONEOUS

A. THE REGIONAL DIRECTOR'S FINDINGS

On February 27, 2020 the Regional Director issued Decision and Direction of Election and the Notice of Election finding the following:

- 1) The plant supervisors were not supervisors within the meaning of the Act;
- 2) The petitioned for unit of plant supervisors constitutes a residual unit to the Intervenor's non-conforming unit under the Board's Health Care Rule on the following grounds:
 - a. The scope of the Intervenor's bargaining unit is not defined in the CBA, nor in any other documents or testimony in the record;

- b. The record establishes that the Intervenor's bargaining unit does not include all skilled maintenance employees, as called for under the Board's Health Care Rule, because it excludes plant supervisors; and
 - c. In the absence of such evidence defining the scope of the Intervenor's bargaining unit, the existing unit is considered a non-conforming unit.
- 3) With respect to the Community of Interest shared between skilled maintenance employees represented by 1199 SEIU and plant supervisors, the Regional Director effectively determined that the parties failed to produce witnesses to provide evidence relating to the community of interest and evaluated the community of interest factors based upon the limited testimony of Mr. Florissant. (*See*, DDE at 11).

A review of the Regional Director's Decision and Direction of Election, confirms that the findings of the Regional Director are clearly erroneous in a number of respects, with prejudicial effect to the Employer, thereby warranting review. In light of this prejudicial error, the Hospital requests that the election currently scheduled for March 19, 2020 be stayed as the Board reviews the instant Request for Review.

B. LEGAL ANALYSIS

1. The Evidence Establishes That The Plant Supervisor Position Is The Functional Equivalent Of The Stationary Engineer Classification Included In The CBA.

It is well established that unit clarification is appropriate where employees perform "the same basic function historically performed by members of the bargaining unit. *Premcor, Inc.* 333 NLRB at 1366. In *Premcor*, the employer modified and changed the title of various employees in a newly created department. While the title was changed, the employee's duties and responsibilities were fundamentally the same as the position enumerated in the existing bargaining

unit. The Board held that the employees essentially performed “bargaining unit work” and, thus, the re-classification of title was not relevant. *Id.* at 1366. The Board further ruled that the fact the modified position allowed employee’s to engage in “somewhat more discretionary and technical functions” did not change the fact that employees were essentially performing the same fundamental duties. *Id.*

Applying the *Premcor* standard here, the plant supervisors have historically been performing the essential duties and responsibilities of stationary engineers, who are in the already existing bargaining unit. As evidenced in the “position description” of stationary engineers at FHMC, the responsibilities are substantially similar to that of the plant supervisors. (*See*, Exhibit A, Declaration of Ayanna Blake). Furthermore, Mr. Florissant testified that the plant supervisor position is the functional equivalent of the stationary engineer position, because they require the same licensing and certification requirements. *See, Premcor, Inc.* 333 NLRB at 1366. The fact that Hospital misclassified the plant supervisors does not present a contract bar, as they were essentially performing bargaining unit work. For these reasons, the Regional Director’s decision should be overturned, as unit clarification is the appropriate remedy to clarify this existing group of plant supervisors.

Furthermore, the Regional Director’s reliance on the holding in *St. Mary’s Duluth Clinic Health System* is misplaced because the unit is a conforming unit under the Board’s Health Care Rule, as all non-supervisory skilled maintenance employees in the unit, are included in the existing bargaining unit.

2. *The Regional Director Erroneously Disregarded Evidence That Plant Supervisors Share A Community Of Interest With The Existing Bargaining Unit.*

To determine whether a unit is appropriate, the Board looks at whether the petitioned-for-employees have shared interests. Specifically, the Board analyzes “whether employees in the proposed unit share a community of interest sufficiently distinct from the interest of employees excluded from the unit to warrant a separate bargaining unit.” *PCC Structural, Inc.*, 365 NLRB 160 (2017), *slip op.* at 11.

In *PCC Structural*, the Board considered whether employees:

- (1) are organized into a separate department;
- (2) have distinct skills and training;
- (3) have distinct job functions and perform distinct work;
- (4) are functionally integrated with other employees;
- (5) have frequent contact with other employees;
- (6) interchange with other employees;
- (7) have distinct terms and conditions; and
- (8) are separately supervised.

PCC Structural, *slip op* at 6.

Furthermore, the Board has held that there is no hard and fast definition or an inclusive or exclusive listing of the factors to consider [under the community-of-interest standard]. Rather, unit determinations must be made only after weighing all relevant factors on a case-by-case basis.” *Country Ford Trucks*, 229 F.3d at 1190-91.

Here, contrary to the Regional Director’s decision, the record clearly establishes that plant supervisors share a community of interest with the skilled maintenance employees represented in the bargaining unit. As evidenced during the hearing, plant supervisors on all three shifts work

with employees across all trade shops, evaluate and oversee the work of employees across trade shops, and perform tasks that maintenance employees perform on an as needed basis.

Likewise, the terms and conditions of employment of plant supervisors is substantially similar to the skilled maintenance workers across the Department's trade shops. They receive annual evaluations under the same appraisal system, receive over-time; are entitled to similar benefits such as annual leave; are subject to the same personnel policies and receive the same employee handbook; wear name badges, use the same parking lot; timeclock; break room; bulletin boards; attend the same meetings as well as occasional group meetings and in-service training sessions. (Tr. 99; 5-15). Accordingly, the plant supervisors share substantial common interest with the existing bargaining unit.

Significantly, the Regional Director's Decision and Direction of Election is replete with findings that are indicative of a shared community of interest by crediting much of Mr. McGroaty's testimony. As examples:

- The Regional Director credited the testimony of Mr. McGroaty, acknowledging that plant supervisors work with an assign tasks to maintenance workers, such as "exigency of a defective heating system or a leaky toilet." (DDE at 16).
- The Regional Director further credited testimony of Mr. McGroaty, acknowledging that plant supervisors "provide guidance and training to employees when they do not perform tasks appropriately." (DDE at 16).

In the Board's brief analysis of community of interest evidence, the Regional Director cited that plant supervisors are eligible for higher raises, and, difference in supervision. These facts are irrelevant. In *PCC Structural*s, the Board made it clear that no one factor is controlling in a

community of interest argument. *PCC Structural, Slip op* at 6. Furthermore, plant supervisors have different training and job functions, and are thus, higher wage earners. This should not preclude them from the existing bargaining unit. They have common departmental organization, common supervision frequent contact and their job functions are highly integrated. Accordingly, the plant supervisor classifications share a substantial community of interest, such that they should be properly included within the same bargaining unit.

3. *The Board's Failure To Issue a Subpoena To A Plant Supervisor Resulted In Prejudicial Error To The Employer*

Section 102.66(f) of the Board Rules and Regulations states:

(f) Subpoenas. The Board, or any Member thereof, shall, on the written application of any party, forthwith issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents, in their possession or under their control. The executive secretary shall have the authority to sign and issue any such subpoenas on behalf of the Board or any Member thereof. Any party may file applications for subpoenas in writing with the Regional Director if made prior to hearing, or with the Hearing Officer if made at the hearing. Applications for subpoenas may be made ex parte. The Regional Director or the Hearing Officer, as the case may be, shall forthwith grant the subpoenas requested.

NLRB, Rules and Regulations §102.66(f).

As explained earlier, at the hearing, the undersigned made a request that the Board Agent, Ms. Anderson exercise its subpoena power set forth in §102.66(f) by issuing a subpoena to plant supervisor Mr. McSloy, who was no longer cooperative and willing to testify on the Hospital's behalf. Despite this request, the Board Examiner refused to issue a subpoena. Furthermore, the Board failed to examine Mr. McGroaty on the "community of interest" evidence. Instead, in its decision the Board determined that the Hospital failed to call witnesses and therefore the Board

had limited testimony on this issue. The Board's conduct at the hearing resulted in significant prejudicial error.

For these reasons, to the extent the Board cannot make a determination on whether the plant supervisors and existing bargaining unit share a community of interest with each other, the Hospital respectfully requests that the Regional Director's decision be overturned and the hearing be reopened for the Board to issue a subpoena to relevant plant supervisor witness and the hearing be continued.

4. *The Board Should stay the regional director's decision & direction of election*

Section 102.67(j)(1) of the Board Rules and Regulations states:

A party requesting review may also move in writing to the Board for one or more of the following forms of relief: [(ii) A stay of some or all of the proceedings...

NLRB, Rules and Regulations §102.67(j)(1).

As explained below, the Board should stay JHMC's duty to bargain pending the Board's decision on this Request for Review.

Absent the granting of a stay of the duty to bargain, an employer must bargain with a union following the certification of election results, notwithstanding the employer's filing of a Request for Review. In *Corrmna v Queen of the Valley Medical Center*, 2017 U.S. Dist. LEXIS 197502 (N.D. Cal. 2017). This requirement could place the employer and union in difficult position. Specifically, if the employer bargains with the union, it waives the right to further challenge the certification of election, leaving the employer in a reluctant position to bargain creating an appearance of "unfair labor practice."

For the foregoing reasons, JHMC respectfully requests that the Board stay these proceedings, including the imposition of its duty to bargain, pending the issuance of a decision on this Request for Review.

CONCLUSION

For the reasons stated above, the Board should issue an order staying JHMC's obligation to bargain and JHMC's Request for Review should be granted.

Very truly yours,

JAMAICA HOSPITAL MEDICAL CENTER

/s/

 Ayanna T. Blake, Esq.

Attachments

FILED via Electronic Filing System at www.nlrb.gov

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CERTIFICATION OF SERVICE

I HEREBY CERTIFY that on the 14th day of March, 2020, a copy of the foregoing Request for Review and Stay Pending Resolution was electronically filed through the Board's Website (www.nlrb.gov), with a copy served by email on Joe Green, Counsel for Petitioner, Gwynn Wilcox, Counsel for Intervenor and by email and regular mail on Kathy Drew King, Regional Director, Region 29.

/s/ Ayanna T. Blake
Ayanna T. Blake